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In The

Supreme Court of the United States

ENVIRONMENTAL DEFENSE, ET AL.,

Petitioners,

v.

DUKE ENERGY CORPORATION, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF *AMICI CURIAE* OF LAW PROFESSORS IN SUPPORT OF RESPONDENT DUKE ENERGY CORPORATION

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INTEREST OF AMICI CURIAE[1]

Amici are law professors with an interest in constitutional, administrative, environmental, and general regulatory law issues. Each is concerned with the status and development of the law in these areas, and believes that the questions raised by this case are of the highest importance. Each has participated as Amici in courts of appeals that have addressed the new source review program, including the proceedings below and those in *United States v. Cinergy Corp.*, No. 06-1224 (7th Cir. 2006). Their individual qualifications are as follows:

Jonathan Adler is Professor of Law and Co-Director, Center for Business Law & Regulation, Case Western Reserve University. He teaches courses in administrative, constitutional, and environmental law, and his writing focuses primarily on environmental and regulatory policy issues.

John S. Baker, Jr., is the Dale E. Bennett Professor of Law, Louisiana State University Paul M. Herbert Law Center. He teaches constitutional law and federal courts, and has litigated a number of federal court cases.

Dr. John C. Eastman is Professor of Law, Chapman University School of Law, where he teaches constitutional law. He is also Director of The Claremont Institute Center

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[1] The parties have consented to the filing of this brief. Environmental Defense and Duke Energy Corp. have filed herein letters of consent to the filing of amicus briefs in support of either party, and the United States' letter of consent is filed herein in conjunction with the brief. Pursuant to Rule 37.6, counsel hereby states that this brief was not authored in whole or in part by counsel for a party and that no monetary contribution to the preparation or submission of this brief was made by any person other than Amici and their counsel.

for Constitutional Jurisprudence, in which capacity he has litigated a number of cases addressing the structure of the U.S. Constitution, including *United States v. Morrison*, 529 U.S. 598 (2000), *Solid Waste Agency of Northern Cook Co. v. Corps of Engineers*, 531 U.S. 159 (2001), and *Rancho Viejo LLC v. Norton*, 323 F. 3d 1062 (D.C. Cir. 2003).

James L. Huffman is the Erskine Wood Sr. Professor of Law, Lewis & Clark Law School. He is former Dean, Lewis & Clark Law School, and is former Director of the Natural Resources Law Institute at Lewis & Clark Law School.

Donald J. Kochan is Assistant Professor of Law, Chapman University School of Law, where he teaches courses in natural resources law, environmental law, federal courts, property, and law and economics.

Roger Meiners is the John and Judy Goolsby Distinguished Professor of Economics and Law, University of Texas at Arlington. He has written and edited several books on environmental law and policy.

The views expressed herein are those of the individual Amici, and do not necessarily represent the views of any group or organization with which any of them may be affiliated.

SUMMARY OF ARGUMENT

The court of appeals correctly interpreted the Environmental Protection Agency's ("EPA") prevention of significant deterioration regulations' definition of "modification" consistent with the new source performance standards regulations' use of that term. Courts entertaining civil

judicial enforcement actions by an administrative agency have an absolute duty to determine what the law is, and not merely blindly accept the agency's interpretation of the law advanced in that enforcement action. Where the law being applied is a regulation promulgated by an agency exercising delegated authority, the court must follow the reasonable interpretation of that regulation which is consistent with the governing statute under which such delegation was made. This duty is not affected by the existence of provisions in the governing statute limiting the jurisdiction of a court entertaining the enforcement action to review prior agency action, which resulted in the original promulgation of the underlying regulation.

The court of appeals followed these established principles. It determined that the EPA's litigation position in this case conflicted with the Clean Air Act. The court of appeals also adopted the district court's analysis demonstrating that the prevention of significant deterioration regulations governing this action could be interpreted consistently with the statute and the regulatory text. Indeed, the EPA itself interpreted the regulations in this way at the time they were promulgated. Upon these findings, the court of appeals correctly exercised its independent judgment and found that the prevention of significant deterioration regulations had a meaning consistent with the Clean Air Act.

Petitioners' attempts to mischaracterize the court of appeals' analysis of the Clean Air Act's statutory provisions as judicial review prohibited by Clean Air Act § 307 are unavailing. Petitioners argue that the court of appeals engaged in unauthorized judicial review because the prevention of significant deterioration regulations cannot

be interpreted consistently with the new source performance standards regulations. This argument misses the point. If the prevention of significant deterioration regulations cannot be interpreted consistently with the new source performance standards regulations, the court of appeals would have erred by incorrectly interpreting the regulation, not by exceeding Clean Air Act § 307's limitations on its jurisdiction. The court of appeals did not so err, however.

More fundamentally, by arguing that the court of appeals mistakenly considered the Clean Air Act's plain language when adjudicating the merits of the EPA's litigation interpretation of its regulations, Petitioners ask the Court to prevent lower courts throughout the country that are currently considering alleged violations of the prevention of significant deterioration or new source review program from giving these regulations meaning consistent with the Clean Air Act's plain text. The Court should refuse. Instead, it should reaffirm the longstanding principle that courts in an enforcement action predicated upon an alleged violation of a regulation must determine the meaning of that regulation to determine whether the law has been violated, and those courts may not give a regulation a meaning that would conflict with the regulation's governing statute if another construction is possible.

ARGUMENT

As explained in respondent Duke Energy Corp.'s brief, the EPA's prevention of significant deterioration regulations refer to two different terms: "modification" and "major modification." Every legislative rule defining the

term "modification" has required that a physical or operational change increase the inherent emitting capacity of an existing unit. The term "major modification" has always been defined as a "modification" that increases "source wide" annual emissions. The district court and court of appeals resolved the meaning of the prevention of significant deterioration regulations' repeated reference to "modification." It is in this regulatory context that the jurisdictional arguments about the scope and effect of Clean Air Act § 307 must be analyzed.

I. THE COURT OF APPEALS' FINDING THAT THE CLEAN AIR ACT MANDATES CONSISTENT USAGE OF THE TERM "MODIFICATION" BETWEEN THE PREVENTION OF SIGNIFICANT DETERIORATION AND NEW SOURCE PERFORMANCE STANDARDS PROGRAMS WAS A NECESSARY PART OF ITS REGULATORY ANALYSIS.

A. Courts Deciding Clean Air Act § 113 Civil Judicial Enforcement Actions Must Give The Regulations At Issue Meaning Consistent With the Clean Air Act, Regardless Of Clean Air Act § 307(b).

Upon being presented with the civil judicial enforcement action brought by the government against Duke Energy Corp., the district court and court of appeals had an independent duty to determine the meaning of the regulations that the government accused Duke Energy of violating. In so doing, the court of appeals applied the well-established canon of regulatory construction that regulations should be construed consistent with their governing statutes. This analysis is unaffected by the

court's duty to defer to agency interpretations that are not "plainly erroneous or inconsistent with the regulation," *see Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945), and Clean Air Act § 307(b)'s limits on courts' ability to judicially review agency action.

1. Courts Have An Independent Duty To Ascertain The Meaning Of The Law That Governs The Case Pending Before Them.

Courts presented with Clean Air Act civil judicial enforcement actions must ascertain which legal principles govern the proceedings before the fact finder (be it judge or jury) can apply the law to the facts of the action. The government can only impose civil liability on an individual where that individual's conduct violates a statute, or a regulation that has the force and effect of law. A regulation can only have such force if the administrative agency promulgating the regulation exercises the authority Congress delegated it by statute. *See, e.g., Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995) (noting that regulations not promulgated through proper statutory means "do not have the force and effect of law and are not accorded that weight in the adjudicatory process."). Under our judicial system, "it is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). This applies whether the governing law is the United States Constitution, *see, e.g., id.*, statute, *see, e.g., Diamond v. Chakrabarty*, 447 U.S. 303, 315 (1980), or a regulation promulgated by an administrative agency.

This is not to say that judicial interpretive prerogative to determine the meaning of the law is unlimited. Courts

must generally apply this Court's admonition about the need to defer to an agency's interpretation of its regulations unless the interpretation is "plainly erroneous or inconsistent with the regulation." *Seminole Rock*, 325 U.S. at 414 (1945); *see also Auer v. Robbins*, 519 U.S. 452, 461 (1997). *Seminole Rock* deference is justified by the administrative agency's superior competence to understand and explain regulations, the agency's greater political accountability relative to courts (which makes the agency more appropriate than courts to make policy decisions inherent in interpreting regulations promulgated pursuant to delegated legislative statutory power), and the relative competence of courts and agencies in making policy decisions. *See* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 629-30 (1996). As a mandatory discretion doctrine, the *Seminole Rock* principle operates much like the *Chevron* doctrine, *see Chevron USA, Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1983), preventing judges from substituting preferred interpretations of a regulation for the agency's interpretation.

In order for the *Seminole Rock* doctrine to function, however, it is imperative that courts be given full discretion to address both regulations and the statutes under which these regulations are promulgated. Neither the *Seminole Rock* doctrine nor any other relevant legal precedent compels blind judicial acceptance of the agency's interpretative position. Indeed, it is clear that authority to address the meaning of the regulation itself is necessary to determining whether an agency's interpretation of its rule is consistent with the regulatory text. Moreover, this authority must also extend to the governing statutes,

because courts have a duty to ensure that the agency's interpretation of the regulation does not "run afoul of . . . a federal statute." *Stinson v. United States*, 508 U.S. 36, 46 (1993). As such, courts' duty to address the meaning of regulations to avoid conflict with their governing statutes does not conflict with the *Seminole Rock* deference principle, it enforces it.

This Court recognized in *Seminole Rock* itself that "[t]he intention of Congress . . . in some situations may be relevant in . . . choosing between various constructions." 325 U.S. at 414. This, of course, is not the only instance where *Seminole Rock* deference is unwarranted: courts should not defer to an agency's interpretation of its regulations advanced in litigation if there is "reason to suspect that the [agency's] interpretation [of its regulations] does not reflect the agency's fair and considered judgment on the matter in question." *Auer*, 519 U.S. at 462. Often, this is because the agency's interpretation of its regulations has fluctuated. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 539 n.29 (1982) (refusing to defer to agency's interpretation where "there is no consistent administrative interpretation of the . . . regulations").

Where the proper meaning of the regulation is before the court and the agency's interpretation of the regulation is not due *Seminole Rock* deference, courts must independently address the meaning of a regulation. *Commissioner v. Schleier*, 515 U.S. 323 (1995), illustrates this point. In *Schleier*, this Court addressed whether the recipient of a settlement for back pay and liquidated damages under the Age Discrimination in Employment Act of 1967 must include the settlement in his gross income. At issue was an Internal Revenue Service ("IRS") regulation that permitted recipients to "exclude[] from gross

income the amount of any damages received (whether by suit or agreement) on account of personal injuries or sickness. . . . through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." *Id.* at 333 (quoting 26 C.F.R. § 1.104-1(c) (1994)).

In the past, the IRS had interpreted the portion of this regulation permitting exclusion of damages received "through prosecution of a legal suit or action based upon tort or tort-type rights" to supersede the regulatory and statutory requirement that the damages be received "on account of personal injuries or sickness," although it currently interpreted the regulations as requiring both a legal suit for tort-type rights and that damages be received for personal injury or sickness. *See id.* at 329 (quoting 26 U.S.C. § 104(a)(2)), 333 (quoting 26 C.F.R. § 1.104-1(c)). The respondent attempted to exclude back pay and liquidated damages based on the prior interpretation, but this Court disallowed the exclusion. In so doing, however, the Court did not "accord [the Commissioner's] present litigating position any special deference." *Id.* at 333 n.7. Instead, it accepted the Commissioner's position because "she reads the regulation correctly in this case." *Id.* To determine that the Commissioner's interpretation of her regulation was correct, this Court ascertained the correct reading of the regulation, free from the bounds of any deference doctrines.

2. In Determining What The Law Is, Courts Should Accept The Reasonable Construction Of A Regulation That Does Not Conflict With A Federal Statute.

It is a fundamental principle of administrative law that when courts are charged with interpreting regulations, they ought to interpret the regulations to avoid conflict with the regulation's governing statute, provided the regulations can be construed to avoid such a conflict. This principle has been applied by the Supreme Court, *see N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512 (1982), and has been followed as binding precedent in at least eight United States Courts of Appeals: the Third Circuit, *see LaVallee Northside Civic Ass'n v. Virgin Islands Coastal Mgmt. Comm'n*, 866 F.2d 616, 623 (3d Cir. 1989) ("[O]ur starting point is to attempt reconciliation of seemingly discordant statutes and regulations. Only where that outcome is not possible do we disregard the regulations."), Fourth Circuit, *see United States v. Duke Energy Corp.*, 411 F.3d 539 (4th Cir. 2005), *cert. granted sub nom., Environmental Def. v. Duke Energy Corp.*, 126 S. Ct. 2019 (2006), Fifth Circuit, *see Steen v. Comm'r*, 508 F.2d 268, 270 (5th Cir. 1975) (reading regulation "in light of its underlying statute," in order "to avoid a construction which brings the validity of the regulation into question"), Eighth Circuit, *see N. Natural Gas Co. v. O'Malley*, 277 F.2d 128, 134 (8th Cir. 1960) (stating that "courts will ordinarily avoid a construction which raises doubt as to the validity of the regulation" where the invalidity would have arisen from inconsistency between the interpretation and statute), Ninth Circuit, *see League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 n.8 (9th Cir. 2002) (rejecting agency's "interpretation of the regulation," and instead giving regulation "a construction consistent with its administrative history, case

law, and *the governing statute*") (emphasis added), Tenth Circuit, *see Joy Techs. v. Sec'y of Labor*, 99 F.3d 991, 996 (10th Cir. 1996), *cert. den'd*, 520 U.S. 1209 (1997) ("We refuse to give effect to an interpretation of a regulation which is not reasonable and consistent with the statute that the regulation is meant to implement") (internal quotations omitted), Eleventh Circuit, *see Steen*, 508 F.2d at 270, and District of Columbia Circuit, *see DRG Funding Corp. v. Sec'y of the United States Dep't of Housing and Urban Dev.*, 898 F.2d 205, 209 (D.C. Cir. 1990) (accepting plaintiff's "alternative constructions of the regulation that avoid conflict with [a] statutory provision").[2]

This Court's decision in *North Haven Board of Education v. Bell*, 456 U.S. 512 (1982), is instructive. In *North Haven*, this Court rejected a challenge to the Department of Health, Education and Welfare's ("HEW") regulations under Title IX of the Education Amendments of 1972 because they could permit HEW to terminate all federal education funds to an institution that discriminated against employees in one particular program on the basis of gender. The regulations in question were susceptible to two possible interpretations. The first would permit HEW to terminate *all* federal funds to an educational institution

[2] The admonition that courts should construe regulations to avoid conflicts with statutes has been applied by other United States courts as well. *See, e.g., Exxon Corp. v. United States*, 40 Fed. Cl. 73, 90 (1998) ("[I]f fairly possible, legislative regulations must be construed to avoid conflict with a statute."); *Bhada v. Comm'r*, 89 T.C. 959, 973 (1987) (same); *Carrete-Michel v. INS*, 575 F. Supp. 150, 155 (W.D. Mo. 1983) (rejecting government's construction of regulation in order to avoid statutory questions which would endanger the validity of the regulation); *Fuller Brush Co. v. United States*, 262 F. Supp. 989, 999 (D. Conn. 1966) (construing tax regulation so as not to conflict with the plain language of a statute).

that discriminated against women in any one of its programs. The second would construe the regulations as program-specific. In selecting between these interpretations, the Court stated that it "normally defers to the agency's interpretation" of its regulations, but that "there is no consistent administrative interpretation of the Title IX regulations for us to evaluate" because HEW's "interpretation has fluctuated from case to case, and even as this case has progressed." *Id.* at 539 n.29. Accordingly, this Court interpreted "the regulations [to] conform with the limitations Congress enacted" in the Title IX program. *Id.* at 539. *North Haven* conclusively determines that this Court has blessed courts' ability to interpret regulations consistent with their governing statutes where the regulations' meaning is in question and the *Seminole Rock* deference principle is not appropriate.

Another instructive example of the application of this principle is *DRG Funding*, 898 F.2d 205. In that case, DRG Funding owned numerous mortgages coinsured by the Department of Housing and Urban Development ("HUD"). When borrowers defaulted on several loans, DRG Funding requested that HUD pay the insurance proceeds through debentures, and that interest on the debt instruments should accrue from the date of default. HUD refused to pay interest from the date of default and instead stated that it would pay interest only from the time it settled the insurance claims. While the plain language of the regulations supported DRG Funding's argument, HUD based its refusal to pay on two grounds. First, HUD argued that the "provisions are inconsistent with the general thrust of the entire body of HUD's coinsurance regulations." *Id.* at 207. The court rejected this argument. Second, HUD argued that the plain language of the regulation would contravene

the statutory mandate that a "coinsured lender bear at least 10% of the insured loss when a borrower defaults." *Id.* at 209 (describing 12 U.S.C. § 1715z-9(a)(1)). While the court accepted HUD's objection that its regulations did not provide any mechanism for making the coinsured lender bear 10% of the loss, the court accepted DRG Funding's "alternative construction[] of the regulation that avoid[ed] conflict with that statutory provision" and capped the interest and principle payment at 90% of the loss. As such, the D.C. Circuit interpreted the regulation to conform to a statutory mandate to which the plain language of HUD's regulations did not conform.

3. Clean Air Act § 307 Does Not Alter The Court's Duty To Determine What The Law Is.

Petitioners argue that it would frustrate the purpose of Clean Air Act § 307(b) to permit courts to ascertain the meaning of the EPA's Clean Air Act regulations by referring to the Clean Air Act and the regulations, rather than the regulatory text alone. In essence, Petitioners argue that the policy imperatives of finality and national uniformity reflected in Clean Air Act § 307(b) should override the court's ability in an enforcement action to determine what the law is and, in particular, to give regulations meaning consistent with their governing statute. Irrespective of whether Congress could do this if it so desired, Amici think it is clear that nothing in Clean Air Act § 307(b)'s plain language or legislative history suggests that a court in which a civil judicial enforcement action is pending lacks jurisdiction to determine the meaning of the regulation on which violation liability is premised by reference to the regulation's governing statute.

Clean Air Act § 307(b)(2) states that "*[a]ction of the Administrator* with respect to which review could have been obtained under [Clean Air Act § 307(b)(1)] shall not be subject to *judicial review* in civil . . . proceedings for enforcement." 42 U.S.C. § 7607(b)(2) (emphasis added). According to its very terms, this statute speaks only to "action of the Administrator" and "judicial review." It does not speak to the court's existing duty to address the meaning of regulations before it.

Petitioners' argument proves too much. If the EPA's reading of its prevention of significant deterioration regulations were reasonable and consistent with the Clean Air Act, this Court would defer because it determined that the *Seminole Rock* deference principle applied, not because Clean Air Act § 307 prevented it from determining the meaning of the regulations. It follows that in the instant case, where the *Seminole Rock* deference principle does not apply because the EPA's litigation interpretation is not consistent with the Clean Air Act (and because the Agency's interpretation of its regulations has vacillated), Clean Air Act § 307 likewise does not prevent the court from determining the meaning of the regulations. Simply put, courts entertaining enforcement actions must determine whether the alleged actions occurred, what the regulations allow or prohibit, and whether the alleged actions violate the regulations. All that is at issue in the instant action is the second step – the court's determination of what the regulations mean. In so doing, the court of appeals made this determination by reference to the Clean Air Act's statutory language.

At least one other court of appeals has given regulations meaning consistent with their governing statutes despite the existence of constraints on judicial review

analogous to Clean Air Act § 307(b). In *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002), the Ninth Circuit interpreted the EPA's regulations promulgated under the Federal Water Pollution Control Act dictating what are and are not point sources of water pollution to include aerial insecticide spraying as a point source of pollution. This interpretation required that the Forest Service obtain a permit to spray, and contradicted the Forest Service's interpretation of the regulations, which was based on its consultation with the EPA. In refusing to defer to the EPA's interpretation of its point source regulations, the court accepted the League of Wilderness Defenders' argument that the interpretation was impermissible and stated that the EPA "has some power to define point source and nonpoint source pollution *where there is room for reasonable interpretation of the statutory definition*. However, the EPA may not exempt from [] permit requirements that which clearly meets the statutory definition of a point source by 'defining' it as a non-point source." *Id.* at 1190 (emphasis in original).[3]

In opposition, the Forest Service claimed that the court's interpretation of the point source regulation was prohibited by Federal Water Pollution Control Act § 509, which is identical in all relevant respects to Clean Air Act § 307. The Ninth Circuit rejected this argument, stating that "we do not reach the Forest Service's arguments regarding [Federal Water Pollution Control Act § 509(b)]

[3] While *League of Wilderness Defenders* was a suit between several environmental groups and the Forest Service Department, in relevant part, the Ninth Circuit treated "the two letters and guidance document [on which the Forest Service Department relied] as definitive pronouncements of the EPA." 30 F.3d at 1190.

because we do not invalidate the regulation. Rather, we reject the Forest Service's interpretation of the regulation and give it a construction consistent with its administrative history, case law, *and the governing statute.*" *Id.* at 1190 n.8 (emphasis added). Put another way, the fact that a challenge to the validity of the regulation itself might have been time-barred did not matter because the court was merely discharging its duty to determine the law, not challenging the regulation itself.

League of Wilderness Defenders demonstrates that the canon that courts should give regulations meaning consistent with their governing statutes applies equally to regulations that may not be judicially reviewed because of a statutory bar. Thus, contrary to Petitioners' claims, accepting a construction of the prevention of significant deterioration regulations consistent with the Clean Air Act's plain text is not a means of avoiding Clean Air Act § 307's limitation on the court of appeals' jurisdiction; it is the proper judicial course of conduct whenever an agency attempts to enforce its interpretation of a regulation against a regulated entity in a judicial proceeding.

Indeed, "judicial review," as that term is used in Clean Air Act § 307, refers to a court's ability to overturn particular "action of the Administrator," not its ability to address the meaning of regulations in enforcement actions. This is why the courts, in considering other cases involving Clean Air Act § 307(b), refer to review not as a declaratory function, *see* Henry P. Monaghan, *Marbury and the Administrative State*, 83 Colum. L. Rev. 1, 5-8 (1983) (describing the court's role to determine the meaning of the law as a declaratory function), but as a means of determining whether agency action, like legislative rules, are valid. A court exercising the declaratory function does not decide

whether the regulations underlying the action are valid the way that a United States Court of Appeals deciding a petition for review would. *See* 42 U.S.C. § 7607(d)(8) (enumerating the grounds on which courts "may reverse" action of the Administration "in the case of review"). That is, a court determining the meaning of the law governing an enforcement action does not engage in the type of review generally associated with the D.C. Circuit – assessing the facial validity of the regulation under its governing statute, determining whether the agency's policy choices are reasonable, and determining whether the agency's action is arbitrary or capricious. Instead, it determines the meaning of the regulation without exercising any of these judicial tools.

This distinction is supported by case law governing Clean Air Act § 307, which demonstrates that courts deciding a Clean Air Act enforcement action may determine the meaning of the regulations before them, even if they lack the ability to provide the type of relief associated with judicial review. In *Adamo Wrecking Corp. v. United States*, 434 U.S. 275 (1978), for example, this Court considered whether an earlier version of Clean Air Act § 307(b) precluded a defendant in a criminal judicial enforcement action from arguing in its defense that the emission standard for asbestos it allegedly violated was not an emission standard under the plain language of the Clean Air Act. This Court held that the defendant could assert this defense because Clean Air Act § 307 "does not relieve the Government of the duty of proving, in a prosecution under [Clean Air Act] § 113(c)(1)(C), that the regulation allegedly violated is an emission standard." *Id.* at 284. In other words, this Court held that Clean Air Act § 307's bar on judicial review does not preclude defendants

in criminal civil judicial enforcement actions from contesting the government's allegations about the *meaning* of the regulation.

To be sure, this Court's decision in the *Adamo Wrecking* case arose in a criminal prosecution. However, courts' ability to determine the law in a civil judicial enforcement action, with substantial civil penalties being sought – in this case in the *billions* of dollars – should be no more limited. The rule of lenity applied by the *Adamo Wrecking* court in interpreting Clean Air Act § 307(b)(2) applies equally to the punitive criminal and civil aspects of Clean Air Act § 113(c), the statute that forms the basis both for the criminal judicial enforcement action in *Adamo Wrecking* and the civil judicial enforcement action before the Court today. *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 525 (1992) (Stevens, J., dissenting) ("The main function of the rule of lenity is to protect citizens from the unfair application of ambiguous *punitive* statutes.") (emphasis added); *United States v. One 1973 Roll Royce By and Through Goodman*, 43 F.3d 794, 801 (3d Cir. 1994) (applying rule of lenity to civil statute that is "punitive in nature").

Even if the rule of lenity does not apply in the instant case, a parallel canon of construction – that Congress must demonstrate "clear and convincing evidence of legislative intent" to restrict the right of an aggrieved person to have a court determine the law before the traditional exercise of that judicial function would be precluded – would still apply. *E.g., Bd. of Governors v. MCorp. Fin., Inc.*, 502 U.S. 32, 44 (1991). Applying either canon in this situation leads to the same conclusion this Court reached in the *Adamo Wrecking* decision: that the district court and court of

appeals had jurisdiction to determine the meaning of the prevention of significant deterioration regulations.[4]

4. Construing Regulations To Avoid Conflicts With Statutes Ensures That Agencies Do Not Exceed Their Delegated Powers.

In addition to being fully supported by this Court's jurisprudence, construing regulations to avoid conflict with their governing statutes is compelling regulatory policy. Courts ensure that an administrative agency's delegated power stays within its proper statutory bounds when they give the regulations at issue in an action meaning consistent with their governing statute. The general principle underlying deference to administrative agencies is that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion." *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688, 2699 (2005). A legislative rule may be susceptible to multiple interpretations, not all of which are consistent with the governing statute. As long

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[4] This conclusion comports with the principle that Article III courts have jurisdiction to determine their jurisdiction. *See, e.g., United States v. United Mine Workers*, 330 U.S. 258, 291 (1947). A district court entertaining a civil judicial enforcement action would lack jurisdiction to determine whether a legal argument raised by the defendant in a civil judicial enforcement action were a permissible alternative interpretation of the regulation, or a prohibited attack on the regulation itself, if the court could not itself determine the meaning of the rule. In other words, if the court of appeals were precluded from determining the meaning of the regulation, it could not determine that it lacked jurisdiction. This result underscores Petitioners' fundamental misreading of Clean Air Act § 307.

as the administrative agency's actions under the regulation are consistent with the statute, it does not exceed its statutory delegation. However, when the administrative agency brings an action under the regulation that exceeds the agency's statutory authority, this principle allows courts to ensure that the agency's action proceeds under the terms of the delegation, while still giving effect to the critical policy decisions that the agency made when it promulgated the regulation itself.

Moreover, courts create disincentives for agencies to change legislative rules without undergoing notice and comment rulemaking procedures by determining the meaning of regulations at issue consistently with the governing statutes. As a practical matter, agencies oftentimes attempt to advance interpretations or reinterpretations of legislative rules that are the functional equivalent of a new rule. *See, e.g.*, *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997); *Hoctor v. United States Dep't of Agric.*, 82 F.3d 165, 169-70 (7th Cir. 1996). When courts determine the meaning of the law governing an action, however, it becomes less likely that regulated entities will be subject to these aberrant interpretations or reinterpretations.

Finally, according unexamined deference to agencies' interpretations of their regulations is antithetical to our constitutional structure, undermining the legitimacy of the administrative state. *Cf.* John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 Colum. L. Rev. 612, 631 (1996) ("[P]ermitting agencies both to write regulations and to construe them authoritatively . . . effectively unifies lawmaking and law-exposition – a combination of powers decisively rejected by our constitutional structure."). This is

doubly the case when the agency's interpretation of its regulations is not merely a strained reading of the regulatory text, but is inconsistent with the governing statute. This Court should not lightly displace the court's fundamental role – declaring the meaning of the law in cases before it. Instead, it should reaffirm the long-standing principle that courts should interpret regulations consistent with their governing statutes.

B. The Court Of Appeals Properly Interpreted The EPA's Prevention Of Significant Deterioration Regulations Not To Conflict With The Clean Air Act.

The gravamen of Petitioners' arguments is that by holding the EPA's litigation interpretation of its prevention of significant deterioration rules up to the Clean Air Act's plain language, the court of appeals' reasoning amounted to an impermissible attack on those regulations. However, the court of appeals simply accepted the EPA's contemporaneous construction of the prevention of significant deterioration regulations because it is consistent with the Clean Air Act's plain language and the regulations themselves. As such, the court of appeals' analysis fits squarely into the proper role of a court adjudicating a civil judicial enforcement action. The fact that applying this law to the projects at issue herein did not lead the court of appeals or district court to find a violation of the prevention of significant deterioration program says nothing about the court of appeals reasoning, only about the weakness of the government's case.

1. The Court Of Appeals Expressly Stated That It Was Addressing The Meaning Of The Prevention Of Significant Deterioration Regulations, Not Invalidating Them.

The court of appeals decision indicates that it understood its role in this case – to determine the meaning of the EPA's prevention of significant deterioration regulations in light of the Clean Air Act and the regulatory text. The court of appeals directly stated the question it was answering, which was the precise question raised by the EPA in its brief: "whether [the EPA] 'can interpret the statutory term modification under PSD differently from how' it has interpreted that term under NSPS." *United States v. Duke Energy Corp.*, 411 F.3d 539, 549 n.7 (4th Cir. 2005). Here, the court of appeals' answer was an unambiguous no, "because Congress mandated that the PSD definition of 'modification' be identical to the NSPS definition of 'modification.'" *Id.* at 547. Having determined the meaning of the Clean Air Act, the court of appeals was thus presented with a second question: whether the prevention of significant deterioration regulations could be interpreted consistently with the new source performance standards regulations. The court of appeals answered this question in the affirmative, stating that "the PSD regulations can be interpreted consistently with pre-existing principles – the NSPS regulations – as the district court demonstrated *and as the EPA's Director of the Division of Stationary Source Enforcement twice opined shortly after the promulgation of the PSD regulations.*" *Id.* at 549 n.7 (emphasis added).

After answering this question by reference to the district court's opinion and the EPA's applicability determinations, the court of appeals did not need to spend voluminous pages hashing out whether the EPA's contemporaneous interpretation, adopted by the district court in a lengthy and rigorous opinion, was closer to the text of the prevention of significant deterioration regulations than the EPA's litigation interpretation.[5] *See id.* at 545-46 (describing district court's regulatory analysis). It is in this sense that "the language and various interpretations of the PSD regulations, on which the district court partially based its holding and which the parties exhaustively discuss, are largely irrelevant to the proper analysis of this case." *Id.* at 547 n.3. That is, in light of the statutory mandate, plausibility is enough; there was no need to engage in a pedantic exposition of each provision of the lengthy prevention of significant deterioration regulations.

Contrary to Petitioners' assertions, the court of appeals simply did not review the validity of prevention of significant deterioration regulations, the "judicial review" precluded by Clean Air Act § 307. And the court of appeals properly recognized that it could not do so, stating that "no question as to the validity of the PSD regulations is (or could be, *see* 42 U.S.C. § 7607(b)), presented here" and that the "PSD regulations remain fully intact and enforceable." *Id.* at 549 n.7. Instead, the court of appeals merely fulfilled its responsibility to say what the law governing this

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[5] This analysis does not mean that Amici believe that Duke Energy Corp.'s regulatory interpretation is further from the text of the prevention of significant deterioration regulations than the government's interpretation.

enforcement action is, accepting the EPA's contemporaneous interpretation because it was consistent with the Clean Air Act and the Petitioners' and the EPA's litigation interpretations were not.

2. The Court Of Appeals' Decision Does Not Render The Prevention Of Significant Deterioration Regulations Unenforceable Or Contradict The Text Of The Regulations.

Petitioners alternately argue that the court of appeals' decision violated Clean Air Act § 307 because: (1) the prevention of significant deterioration regulations are now unenforceable, or (2) the prevention of significant deterioration regulations are not susceptible to a construction consistent with the statute. Neither contention is meritorious.

The argument that the prevention of significant deterioration regulations in effect at the time of the activities at issue in the instant case are unenforceable can be disposed of simply by comparing the case herein with the pending enforcement action against the American Electric Power Company, *see United States v. Am. Elec. Power Co.*, No. C2-99-1182 (S.D. Ohio) (stayed pursuant to Order of May 22, 2006 pending the disposition of the instant case). There, the government argues that certain activities "constituted modifications and thus required NSR permits." *See* Plaintiff's Proposed Conclusions of Law ¶ 249, *Am. Elec. Power Co.* (S.D. Ohio Sept. 1, 2005). That is, these projects required preconstruction permits even though "the modification definition was to be construed consistently with the existing NSPS rules, which defined emission rate in kilograms per hour." *Id.* ¶ 251. It

is clear that, under the court of appeals' decision, Duke Energy (or any other utility in the footprint of the Fourth Circuit) would be liable under the prevention of significant deterioration regulations if it conducted activity equivalent to the activity that the government alleges American Electric Power conducted. The fact that the prevention of significant deterioration regulations would not reach all of the conduct the government wishes them to reach does not render them unenforceable; it only prevents a legally unsupportable application of these regulations.

Petitioners' argument that the prevention of significant deterioration regulations cannot be read consistently with the new source performance standards regulations rests on similarly flimsy grounds. *See, e.g.*, Brief of the United States at 19-20. The government itself has interpreted the "major modification" definition in its prevention of significant deterioration regulations in three distinct ways. The first way is embodied in applicability determinations issued in the regulations' immediate aftermath. *See* Letter from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Amasjit S. Gill, Gas Turbine Div., General Electric, at 1 (June 24, 1981) (stating that "PSD applicability [at a source that had begun normal operations] is determined by evaluating any change in the emissions rates caused by" the change); Letter from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to Charles Whitmore, Chief of Technical Analysis, EPA Region VII (January 22, 1982) (stating that an operational change that increases the number of hours that a source can operate in a year does not constitute a "major modification" under the prevention of significant deterioration regulations); Memorandum from Edward E. Reich, Director of Stationary Source Enforcement, EPA, to

Michael M. Johnston, Chief of Air Operations, EPA Region X, at 3 (July 28, 1983) (stating that "any increase in actual emissions [following a physical change] . . . which will result from the increased capacity provided by the larger [component] must be considered for the purposes of PSD applicability"). The court of appeals expressly selected this contemporaneous interpretation. *See Duke Energy*, 411 F.3d at 547.

Later, the government interpreted the prevention of significant deterioration regulations' definition of "major modification" to contain an "actual-to-potential" test for existing sources that have begun normal operations and have not undertaken projects that constituted "modifications" under the new source performance standards program. *See Wis. Elec. Power Co. v. Reilly*, 893 F.2d 901 (7th Cir. 1989). The government advanced this interpretation of its prevention of significant deterioration regulations in the proceedings below. *See United States v. Duke Energy Corp.*, 278 F. Supp. 2d 619, 640 n.17 (M.D.N.C. 2003) ("The EPA in its briefing argued that . . . the "actual-to-potential" test should apply to Duke Energy's units [that were not NSPS "modifications"]. . . . During the summary judgment hearing on July 18, 2003, the EPA indicated that it would not seek application of the actual-to-potential test. . . ."). Finally, the government adopted the "actual-to-projected-actual" test for existing sources that have begun normal operations and have not undertaken projects that constituted "modifications" for the new source performance standards program. It is this interpretation that the government now disingenuously claims, in the face of egregious agency vacillations *including in the proceedings below*, as the *only* "reasonable" reading of its prevention of significant deterioration regulations. *See*

Brief of the United States at 20 ("The only reasonable reading of the PSD regulations is that a physical change that increases a source's hours of operation is a 'modification.'").

This Court should reaffirm the longstanding principle that courts should not give meaning to a regulation that would conflict with the regulation's governing statute. The Fourth Circuit's decision lacks neither reason nor precedent in this regard. Indeed, it is solidly rooted in both. Reading the prevention of significant deterioration regulations consistent with the plain language of the Clean Air Act Amendments of 1977, which mandates that the EPA interpret "modification" consistently in the prevention of significant deterioration and new source performance standards programs, the court of appeals adopted the only reasonable interpretation of the regulations: the interpretation advanced by Duke Energy Corp. and by the EPA immediately following the prevention of significant deterioration regulations' promulgation. To the extent this is error, and Amici strenuously contend it is not, it is error on the merits of the dispute, not because the court's decision regarding the meaning of the regulation constitutes judicial review prohibited by Clean Air Act § 307.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth by Duke Energy Corp. and its Amici, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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